RECENT CASES

CONSTITUTIONAL LAW—MOTION PICTURE EXHIBITOR HELD TO HAVE NO ABSOLUTE IMMUNITY FROM PRIOR CENSORSHIP

A Chicago ordinance requires a permit for the public showing of any film and submission of the film to the police commissioner [1] for examination or censorship [2] before a permit may issue. Upon petitioner-film distributor's refusal to submit a film for examination, the commissioner withheld the necessary permit. On appeal to the mayor, this denial was made final on the sole ground of petitioner's failure to submit the film. Petitioner then sued in a federal district court to compel the issuance of a permit on the theory that the submission requirement was an unconstitutional restraint on free speech. The district court's dismissal on the ground, *inter alia,* that no justiciable controversy existed [3] was affirmed by the court of appeals.[4] On certiorari the Supreme Court also affirmed, five to four, holding that petitioner had raised a justiciable issue as to the existence of an absolute right to show a film without prior submission to an examiner, but that petitioner's assertion of such a right was not constitutionally sustainable. *Times Film Corp. v. City of Chicago,* 365 U.S. 43 (1961).

The Supreme Court first dealt with the issue of prior censorship [5] in *Near v. Minnesota ex rel. Olson,*[6] which held unconstitutional a statute under which publication of a newspaper had been enjoined following nine malicious and defamatory editions. Chief Justice Hughes, for the majority, emphasized that "liberty of the press . . . has meant, principally, although not exclusively, immunity from previous restraints or censorship . . . ." [7] *Near* did not foreclose the possibility that some previous re-

[1] CHICAGO, ILL., MUNICIPAL CODE § 155-4 (1931). The challenged portion of the ordinance provides that "such permit shall be granted only after the motion picture film for which said permit is requested has been produced at the office of the commissioner of police for examination or censorship."

[2] The commissioner may refuse to issue a permit if the picture is immoral or obscene, portrays unfavorably certain classes of citizens, tends to produce a breach of the peace, or represents any hanging, lynching, or burning of a human being. *Ibid.* The state's power to deny a permit on the ground of obscenity was sustained by the Illinois Supreme Court in American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E.2d 585 (1954).

[3] Times Film Corp. v. City of Chicago, 180 F. Supp. 843 (N.D. Ill.), *aff'd,* 272 F.2d 90 (7th Cir. 1959), *aff'd,* 365 U.S. 43 (1961).

[4] Times Film Corp. v. City of Chicago, 272 F.2d 90 (7th Cir. 1959), *aff'd,* 365 U.S. 43 (1961).

[5] The classical statement is that "the liberty of the press . . . consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published." 4 BLACKSTONE, COMMENTARIES *151-52.

[6] 283 U.S. 697 (1931). Gitlow v. New York, 268 U.S. 652, 666 (1925), had earlier established the application to the states, through the fourteenth amendment, of the first amendment protection of free speech.

[7] 283 U.S. at 716.

straints might be sustained,[8] but it did indicate that such restraints would be constitutional only under exceptional circumstances.[9] The principles announced in *Near* were approved and adopted in *Joseph Burstyn, Inc. v. Wilson*,[10] the first case to reach the issue of prior restraint upon the display of motion pictures. This case not only decided that motion pictures are a protected form of "speech," [11] but recognized that a state must bear a heavy burden to justify any form of previous restraint upon them.[12] The narrow holding of *Burstyn*, however, was only that a film may not be banned on the determination of a censor that it falls within the proscription of the vague term "sacrilegious." [13] The Court expressly left open the question of whether a "clearly drawn statute designed and applied to prevent the showing of obscene films" would be sustained.[14]

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[8] "[T]he protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases: 'When a nation is at war many things that might be said in time of peace are such a hindrance to its effort . . . that no Court could regard them as protected by any constitutional right.' . . . On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of community life may be protected against incitements to acts of violence and the overthrow by force of orderly government." *Ibid.* Although the first amendment commands that "Congress shall make no law . . . abridging the freedom of speech or of the press," the Supreme Court has never extended an absolute protection to any medium of expression. *E.g.*, Dennis v. United States, 341 U.S. 494 (1951); Whitney v. California, 274 U.S. 357 (1927); Schenck v. United States, 249 U.S. 47, 52 (1919). Further, the Court has withheld constitutional protection entirely from certain kinds of communication. Roth v. United States, 354 U.S. 476, 485 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952) (libel); Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942) (fighting words).

[9] Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 716 (1931).

[10] 343 U.S. 495, 503-04 (1952).

[11] *Id.* at 502. *Burstyn* specifically repudiated the holding in Mutual Film Corp. v. Industrial Comm'n, 236 U.S. 230, 244 (1915), that "the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded . . . as part of the press of the country or as organs [*sic*] of public opinion."

[12] Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504 (1952).

[13] *Id.* at 504-06.

[14] *Id.* at 505-06. Subsequent movie censorship cases have also involved the application of particular statutory standards to individual films and have uniformly held the statutes unconstitutional as so applied. Kingsley Int'l Pictures Corp. v. Regents of the University, 360 U.S. 684 (1959); Holmby Prods., Inc. v. Vaughn, 350 U.S. 870 (1955) (per curiam) (*semble*); Superior Films, Inc. v. Department of Educ., 346 U.S. 587 (1954) (per curiam) (*semble*); Gelling v. Texas, 343 U.S. 960 (1952) (per curiam) (*semble*). *But cf.* Superior Films, Inc. v. Department of Educ., *supra* at 588 (concurring opinion). In earlier cases, the Court has struck down prior restraints upon most media of communication. *E.g.*, Winters v. New York, 333 U.S. 507 (1948) (magazines); Cantwell v. Connecticut, 310 U.S. 296 (1940) (religious solicitation); Lovell v. City of Griffin, 303 U.S. 444 (1938) (pamphlets and handbills); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697 (1931) (newspapers); see Dumont Laboratories v. Carroll, 184 F.2d 153 (3rd Cir. 1950), *cert. denied*, 340 U.S. 929 (1951) (television). *But see* Poulos v. New Hampshire, 345 U.S. 395 (1953) (religious meetings in public parks); Kovacs v. Cooper, 336 U.S. 77 (1949) (sound trucks); Cox v. New Hampshire, 312 U.S. 569 (1941) (religious street demonstrations). These cases suggest that the Court, in dealing with state regulations in the interest of public safety and welfare, has been more tolerant of restrictions as to the time, place, or manner of dissemination of speech than of prior control over its content. See Niemotko v. Maryland, 340 U.S. 268, 282-83 (1951) (concurring opinion). However, the question reserved in *Burstyn* and the result of the instant case weaken that suggestion.

The precise holding of the present case is elusive. There is a palpable disparity between its scope as articulated by the majority and the broader latent implications which the dissenters discern.[15] The majority purported to limit its holding to a resolution of the narrow issue framed by the petitioner: "whether the ambit of constitutional protection includes complete and absolute freedom to exhibit, at least once, any and every kind of motion picture." [16] The issue was resolved by rejecting the major premise of petitioner's argument, without suggesting any alternative premises on which an attack could properly be grounded: since petitioner claimed an unqualified right to display its film, whereas the *Near* exceptions clearly do justify *some* previous restraints, petitioner's constitutional attack on the ordinance must fail. The dissenters, while recognizing that *Near* permits certain prior restraints,[17] declared that by necessary implication the majority's holding allows Chicago's blanket censorship scheme to stand as constitutional.[18] For now, any film distributor finding himself in petitioner's situation must either submit his film for examination, in which case he will be able to raise only quite different constitutional issues from those involved in the instant case,[19] or run the risk of having his challenge to the submission provision of the ordinance thrown out of court on the authority of the instant case.[20] Unless an attack upon this provision on vagueness or other grounds [21] can succeed without submission of a film, the effective holding of the case is actually to declare the provision constitutional, or, equally decisive, unassailable. It is unlikely that the majority intended its decision to have such a sweeping effect.[22] But since the ordinary process of constitutional litigation [23] raises little probability that the Court will soon be offered a chance to clarify the limits of its holding, the dangers of misunderstanding inherent in the opinion's abrupt analysis might have counselled a different handling of the case.

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[15] *Compare* majority opinion, instant case at 46-47, *with* dissenting opinion of Chief Justice Warren, instant case at 54-55.

[16] Instant case at 46. Compare notes 25-28 *infra* and accompanying text.

[17] Dissenting opinion of Chief Justice Warren, instant case at 53.

[18] *Id.* at 73.

[19] Instant case at 46. Compare dissenting opinion of Chief Justice Warren, instant case at 73-75.

[20] There is language in the majority opinion which would support the conclusion that no other "broadside" attack upon the Chicago ordinance is possible: "As to what may be decided when a concrete case involving a specific standard provided by this ordinance is presented, we intimate no opinion. The petitioner has not challenged all—or for that matter any—of the ordinance's standards. Naturally we could not say that every one of the standards, including those which Illinois' highest court has found sufficient, is so vague on its face that the entire ordinance is void." Instant case at 50.

[21] See instant case at 46. See generally Note, *The Void-For-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 96-104 (1960). For another possible ground of attack see text accompanying note 28 *infra*.

[22] "Chicago's ordinance requiring the submission of films prior to their public exhibition is not, *on the grounds set forth*, void on its face." Instant case at 46. (Emphasis added.) "At this time we say no more than this—we are dealing only with motion pictures and even as to them, only in the context of the broadside attack presented on this record." *Id.* at 50.

[23] See dissenting opinion of Chief Justice Warren, instant case at 73-74.

If the purpose of the majority opinion was merely to articulate a generally conceded gloss on the dictum in *Near*, the undertaking seems superfluous—especially in light of the importance which any decision in the sensitive area of censorship necessarily assumes. On the seemingly innocuous premise that a state may prohibit by prior restraint some exceptionally harmful motion pictures, the Court may well have raised a precedent for permitting states to impose comprehensive and burdensome licensing systems on all motion pictures in order to reach those exceptional ones which the state is constitutionally permitted to suppress.[24] So far-reaching were the constitutional implications of the instant decision that, instead of simply mouthing the *Near* dictum,[25] the majority should have reformulated the decisive issue[26] so as to permit a more penetrating examination of the concrete problems inherent in delineating first and fourteenth amendment rights,[27] thereby rendering the decisional process in the instant case accordant with the salutary principle, frequently enunciated in opinions in this area, that "though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."[28] Fixing upon such a standard, the majority would have had its attention directed to some of the vexing issues raised by the Chicago ordinance: the existence of alternative methods for achieving the state's legitimate purpose,[29] the adequacy of procedural safeguards afforded to film exhibitors by

[24] The potential danger of the instant case lies in its ambiguity. The case arose as a challenge to the Chicago ordinance, and some language of the majority opinion purports to deal with the validity of that ordinance. Actually, however, the court's holding is addressed to the purely abstract question of an individual's rights under the first and fourteenth amendments. When the Court concludes that the Chicago ordinance "is not, on the grounds set forth, void on its face," it is really saying that in view of its abstract holding *no* statute could be found void on the grounds set forth by the petitioner. By applying its abstract constitutional holding to a specific statute, the Court calls attention to the misleading fact that it sustained the statute in the face of a constitutional attack. The majority, perhaps sensing a need to justify the broader implications of its narrow holding, said that the Supreme Court should not limit a state's selection of an effective statutory program unless there is a specific "showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances." Instant case at 50. Petitioner's presentation of its case did not include such a showing of injury to itself. But, as the dissent pointed out, unreasonable interference with the liberty of real individuals inheres in the very system established by the Chicago ordinance.

[25] If the Court did not feel ready to discuss the constitutional problems involved —beyond a repetition of the *Near* dictum—it would seem that denial of certiorari would have been a better disposition of the case.

[26] Indeed, petitioner did argue that before a state may require submission of a film for examination, it must have reasonable grounds for believing that the film will transgress some valid standard for suppression. See Petition for Rehearing, pp. 2-4, instant case. This went beyond the mere claim of an abstract right and constituted an attack upon the face of the statute. See Shelton v. Tucker, 364 U.S. 479 (1960); Talley v. California, 362 U.S. 60 (1960). See also dissenting opinion of Chief Justice Warren, instant case at 54-55.

[27] *Cf.* Henkin, *Some Reflections on Current Constitutional Controversy*, 109 U. PA. L. REV. 479, 488-90 (1961).

[28] Shelton v. Tucker, 364 U.S. 479, 488 (1960). See also Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 (1957); Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 504 (1952).

[29] Shelton v. Tucker, *supra* note 28, at 288-90.

the program under attack,[30] and the differences between films and other media which might affect the means that can legitimately be undertaken to limit the dissemination of offensive and constitutionally unprotected material.[31] Without these broader considerations, the opinion remains a deceptively imposing and potentially dangerous monument to an unimportant principle.

ELECTIONS—Civilian Employee of Federal Government Living on Military Reservation Is Resident of State for Purpose of Voting Registration

Petitioner, a civilian employee of the federal government, lived on the military reservation where he worked; he had not established any other residence within the United States. Upon refusal of the county voting registrar to enroll him, an original action for mandamus was brought in the state supreme court. The court granted the writ, basing its decision on the state legislature's repeal of a statute which denied voting residence to persons living on Indian or military reservations.[1] Although implying that the legislature had the power to extend the franchise to residents of reservations where the federal government maintains exclusive jurisdiction, the court premised its holding upon a determination that the federal government did not, in this case, exercise such exclusive jurisdiction since it had retroceded to the state jurisdiction to levy taxes, administer schools, and carry out certain other state functions within the reservation.[2] *Rothfels v. Southworth,* 356 P.2d 612 (Utah 1960).

Early decisions held uniformly that acquisition by the federal government of exclusive jurisdiction over land within state boundaries extinguishes both the duties and the privileges of state citizenship, including the right to vote.[3] The Supreme Court of Ohio went so far as to strike down a reservation of the franchise for residents of land over which otherwise

[30] See Kingsley Books, Inc. v. Brown, 354 U.S. 436, 440-44 (1957). See generally Note, *supra* note 21, at 94.

[31] See Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502-03 (1952).

[1] Utah Laws 1896, ch. 126, § 11(11), was repealed by Utah Laws 1957, ch. 38, § 1.

[2] The court mentioned, but did not decide, the alternative ground that—whatever the legal status of residents of those portions of the military reservation acquired by the federal government in such a manner as to create exclusive federal jurisdiction—the portion of the reservation on which petitioner resided was formerly part of the public domain and hence had never been withdrawn from state jurisdiction. Rothfels v. Southworth, 356 P.2d 612, 615 (Utah 1960). See Complaint, pp. 3, 8-9; Brief of Plaintiff, pp. 10-14. *But see* Brief of Defendants, pp. 2-5, 9-10, 16-18. For a recent case where the right to vote turned on the original method of federal acquisition, see Arledge v. Mabry, 52 N.M. 303, 197 P.2d 884 (1948).

[3] Custis v. Lane, 17 Va. (3 Munf.) 579 (1813), was the first decision on this issue. However, the germinal case in the field was Opinion of the Justices, 42 Mass. (1 Met.) 580 (1841). This decision was generally followed for the succeeding century. *E.g.,* Herken v. Glynn, 151 Kan. 855, 101 P.2d 946 (1940); McMahon v. Polk, 10 S.D. 296, 73 N.W. 77 (1897).

exclusive jurisdiction had been ceded, holding that persons living within such an enclave could not satisfy the state constitution's residence requirement for voters.[4] Between 1928 and 1940 Congress provided for the application of state wrongful death and injury law to federal areas,[5] granted the states authority to extend their workmen's compensation acts to these enclaves,[6] and gave the states permission to levy motor fuel, sales, use, and personal income taxes in these areas.[7] The result of these increases in the effect of state power in federal areas [8] has been a reconsideration and, in some cases, modification of the rule denying the franchise to residents of federal enclaves.[9] Nevertheless, there are still large numbers of residents of federal areas who are effectively denied the right to vote.[10]

The court in the present case considered the question before it as one of interpreting the intent of the legislature in amending the Utah election laws.[11] However, since the Utah constitution, like that of the vast majority of states,[12] includes residence in the state as a necessary qualification for

[4] Sinks v. Reese, 19 Ohio St. 306 (1869). The franchise was recovered by these same persons through a congressional retrocession of jurisdiction to the state. See Renner v. Bennett, 21 Ohio St. 431 (1871). Problems resulting from the creation of areas of exclusive federal jurisdiction within the states are not limited to the right to vote. Decisions similar to those listed in note 3 *supra* have been rendered on questions of divorce, estate tax, state crimes committed within federal areas, attendance at public schools, alcoholic beverage laws, and the like. See generally INTERDEPARTMENTAL COMMITTEE FOR THE STUDY OF JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, JURISDICTION OVER FEDERAL AREAS WITHIN THE STATES, pt. I, at 26-27 (1956); *id.*, pt. II, at 105-248 (1957); Note, 101 U. PA. L. REV. 124 (1952). Current federal acquisition and state cession policies have been largely modified to prevent the creation of unneeded federal jurisdiction which gives rise to these problems in federal-state relationships; nevertheless, large areas acquired before these changes in policy are still affected by holdings concerning exclusive federal jurisdiction. See INTERDEPARTMENTAL COMMITTEE, *op. cit. supra* pt. I, at 9-11.

[5] 45 Stat. 54 (1928), 16 U.S.C. § 457 (1958).

[6] 49 Stat. 1938 (1936), 40 U.S.C. § 290 (1958).

[7] 4 U.S.C. §§ 104-10 (1958).

[8] Other changes have been made in the federal-state relationship as to federal enclaves without resulting in reconsideration of the franchise. Examples are the Assimilative Crimes Act of 1948, 18 U.S.C. § 13 (1958), and the declaration and implementation of a federal policy of cooperation with the states to aid in the application of state educational programs to the inhabitants of federal enclaves, see 64 Stat. 1100 (1950), as amended, 20 U.S.C. §§ 236-44 (1958). Similar arrangements have been entered into concerning state and municipal services. See INTERDEPARTMENTAL COMMITTEE, *op. cit. supra* note 4, pt. II, at 186-87.

[9] *Compare* Arledge v. Mabry, 52 N.M. 303, 197 P.2d 884 (1948) (relinquishment to state of prerogatives of exclusive federal jurisdiction is not abrogation of such jurisdiction), *with* Arapajolu v. McMenamin, 113 Cal. App. 2d 824, 249 P.2d 318 (Dist. Ct. App. 1952) (precedents inapplicable because congressional grant of power to states was retrocession of concurrent jurisdiction), *and* Adams v. Londeree, 139 W. Va. 748, 83 S.E.2d 127 (1954) (effective retrocession of jurisdiction to establish residence for voting and office holding). The *Adams* court also found support for its decision in the changing federal acquisition policy within the state and the alteration of the West Virginia cession statute. Compare State *ex rel.* Wendt v. Smith, 63 Ohio L. Abs. 31, 103 N.E.2d 822 (Dist. Ct. App. 1951) (per curiam). Moreover, the rule of the earlier cases has been modified in a few states by statute and in others by administrative decisions extending the right to vote to such residents. See INTERDEPARTMENTAL COMMITTEE, *op. cit. supra* note 4, pt. II, at 224-25.

[10] *Id.* at 225 & n.25.

[11] Instant case at 613-14.

[12] *E.g.*, CAL. CONST. art. II, § 1; MASS. CONST. § 105; N.Y. CONST. art. II, § 1; PA. CONST. art. VIII, § 1.

voting,[13] any extension of the franchise by the legislature must be within the limits of the constitutional definition of resident.[14] Moreover, the constitutional guarantee of a republican form of government[15] is inconsistent with the idea that the several states can grant the right to vote to persons not subject to their sovereignty.[16] Since the reported decisions[17] and the underlying nature of the right to vote in a republican government[18] both indicate that the franchise cannot be extended to areas of exclusive federal jurisdiction, the only decisional support for the present holding comes from those cases which found a retrocession of jurisdiction in the congressional grants of state power over federal enclaves.[19] As a matter of pure legal reasoning, however, once the United States has obtained exclusive jurisdiction over land within a state, this jurisdiction can be returned to a state only through a positive cession by Congress followed by the state's acceptance;[20] anything less than this is an act of grace on the part of the sovereign in no way affecting its sovereignty.[21] Nevertheless, assuming that the Utah court has correctly interpreted the intention of the legislature to extend the franchise to civilian residents of federal military reservations within the geographic boundaries of the state,[22] there are sound reasons for

[13] UTAH CONST. art. IV, § 2.

[14] Even if the legislature had attempted to amend the state constitution on this point, it lacked the power to do so without electoral approval. See UTAH CONST. art. XXIII.

[15] U.S. CONST. art. IV, § 4. The nature of a "republican form of government" requires that the governor be selected only by the governed. See STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 581 (5th ed. 1891); Custis v. Lane, 17 Va. (3 Munf.) 579, 585 (1813) (argument of William Wirt); *id.* at 592 (opinion of Roane, J.). These writers argue that representative government is but an extension of direct democracy which was exercised by, and only by, the residents of the state. See also Commonwealth v. Clary, 8 Mass. 72 (1811); Sinks v. Reese, 19 Ohio St. 306 (1869).

[16] This level of constitutional reasoning has been rendered moot by the state constitutional provisions limiting the franchise to residents. See notes 12-13 *supra* and accompanying text.

[17] See note 3 *supra* and accompanying text.

[18] See note 15 *supra* and accompanying text. The instant case at 614 suggests that it is within the prerogative of the legislature to set the terms of the franchise within the state. While the opinion does not meet the reasoning that areas of exclusive federal jurisdiction are not "within the state," it does suggest that the existence of statutory limitations on the right of residents of federal enclaves to vote implies that this right could exist absent that limitation. As a practical matter, there seems to be little likelihood that the states would extend the franchise to persons in no way subject to their jurisdiction.

[19] See note 9 *supra.*

[20] The necessity of acceptance by the states to create state jurisdiction anew is generally recognized. See INTERDEPARTMENTAL COMMITTEE, *op. cit. supra* note 4, pt. I, at 72-73. *But see* Renner v. Bennett, 21 Ohio St. 431 (1871) (state cession of jurisdiction to federal government is mere suspension of jurisdiction).

[21] The specific language and limitations of the congressional extensions of state law to federal enclaves confirm the fact that Congress did not intend these statutory provisions to be the basis of any argument that the federal government had surrendered its exclusive sovereignty over the areas in question. See statutes cited notes 5-7 *supra.*

[22] The historical reason for the legislation was the Supreme Court's grant of certiorari in the case of Allen v. Merrell, 6 Utah 2d 32, 305 P.2d 490, *cert. granted*, 352 U.S. 889 (1956), *vacated and remanded*, 353 U.S. 932 (1957) (per curiam) (on stipulation that issue was moot), in which the Supreme Court of Utah had upheld the

upholding such legislation. Apart from the bare jurisdiction question, the congressional extension of state taxing power [23] and applicability of state substantive law to residents of federal enclaves [24] has given these residents an increased interest in the formulation of state fiscal policies and legislation. Moreover, both the federal and the state governments have modified their parts in the federal land acquisition policy to limit federal jurisdiction to that minimum necessary for federal operations, which does not normally include the elimination of the right to vote.[25] Large numbers of residents on military reservations are civilians [26] to whom the reasons militating against the extension of the franchise to members of the armed forces are not applicable.[27] State representation in Congress is based in part on the residents of federal enclaves.[28] Finally, the growing importance of federal elections and the increased importance of these elections in comparison to those of the states [29] makes state action denying the right to vote to United States citizens whose only residence is in a federal enclave increasingly unconscionable.

But despite the social and political reasons supporting the present decision of the Utah court, this case and others like it are at most a second-best device for extending the franchise. The basic flaws in the case's legal

state's right to deny the franchise to residents of Indian reservations. Hence the main reason for the repeal was a desire to render moot any federal attack on a possible state discrimination against Indians under U.S. CONST. amend. XV. At the same time, there are suggestions in the legislative history that the legislature also intended to remove the bar against voting by civilian residents of federal military reservations. Brief of Plaintiff, pp. 8-10. This interpretation was taken by OPS. (UTAH) ATT'Y GEN. 58-084 (1958), but was reversed by a later opinion dated May 17, 1960. See Complaint, p. 7. Even following the decision of the court in the instant case, prospective voters resident on military bases are required to establish voting residence in Utah, including residence within an election district. See Brief of Defendants, pp. 19-23; Petition for Rehearing, pp. 6-7.

[23] See note 7 *supra* and accompanying text.

[24] See notes 5-6 *supra* and accompanying text; note 8 *supra*.

[25] See INTERDEPARTMENTAL COMMITTEE, *op. cit. supra* note 4, pt. I, at 9-11.

[26] There are approximately 68,000 civilian residents (military dependents included) on military reservations in the three states of California, Kansas, and Virginia. INTERDEPARTMENTAL COMMITTEE, *op. cit. supra* note 4, pt. I, at 84-96. No statistics exist either separating these figures into civilian technicians as against military dependents or extending these figures to the entire United States.

[27] Federal control over military personnel is effective to prevent the normal establishment of a domicile since such persons are subject to transfer from the state against their will; moreover, the control over these persons by the military commander is sufficient to deny or grant access to the polls at will and would permit the manipulation of state elections by the assignment of personnel within the various states at the will of the federal government. The United States exercises no such control over civilian employees who are not bound to serve for a term of enlistment or conscription.

[28] For purposes of the enumeration required in U.S. CONST. art. I, § 2, as the basis of apportionment of representatives in Congress, residents of federal areas have been credited to the states in which the enclave is located. See 1 U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, A REPORT OF THE SEVENTEENTH DECENNIAL CENSUS OF THE UNITED STATES, CENSUS OF POPULATION: 1950, at ix (1952).

[29] Illustrative of this change are the federal government's use of the commerce power to regulate wages, hours, collective bargaining, agriculture, and other matters formerly viewed as purely local concerns, increased direct federal enforcement of constitutional civil rights, the prosecution of criminals for federal income tax evasion, and the like. Similarly, the disproportionate growth of the federal budget and number of employees as compared to those of the states exemplifies this trend.

reasoning[30] and the improbability that a uniform right to vote will result from this *ad hoc* method of dealing with the problem[31] both militate for another approach. However reasonable and valuable the present decision may be, the ultimate solution lies not in the proliferation of judicial attempts at enfranchisement but in the enactment of a broad federal retrocession statute accompanied by uniform state acceptance legislation.[32]

HABEAS CORPUS—PETITIONER'S DISMISSAL FROM CUSTODY RENDERS MOOT HIS COLLATERAL ATTACK ON STATE CONVICTION

Petitioner was convicted of forgery in a state court. After exhausting his state remedies,[1] he petitioned for a writ of habeas corpus in a federal district court, alleging a denial of due process at his trial.[2] After a hearing, the district court dismissed the petition.[3] The court of appeals affirmed,[4] and the Supreme Court granted certiorari.[5] Before the Court could decide the merits of his case, petitioner was released from prison on an absolute discharge.[6] As a convicted felon, however, he remained disenfranchised under Texas law.[7] The Supreme Court, in a per curiam opinion, dismissed

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[30] See notes 20-21 *supra* and accompanying text.

[31] See INTERDEPARTMENTAL COMMITTEE, *op. cit. supra* note 4, pt. I, at 81-122.

[32] This approach is recommended in INTERDEPARTMENTAL COMMITTEE, *op. cit. supra* note 4, pt. I, at 69-79, as the only satisfactory solution not only to the extension of the franchise but also to the multitude of other problems resulting from the existence of federal areas of exclusive jurisdiction.

[1] Exhaustion of state remedies is a prerequisite to the issuance of a writ of habeas corpus by a federal court. 28 U.S.C. § 2254 (1958), Darr v. Burford, 339 U.S. 200, 204-05 (1950). See generally Reitz, *Federal Habeas Corpus: Impact of an Abortive State Proceeding*, 74 HARV. L. REV. 1315, 1324-32, 1363-73 (1961); Note, *Exhaustion of State Remedies as a Condition for Federal Habeas Corpus*, 34 MINN. L. REV. 653, 658 (1950).

[2] The burden of petitioner's contention was that the trial court's refusal to appoint counsel to defend him made his trial a sham. See Parker v. Ellis, 362 U.S. 574, 578-81 (1960) (dissenting opinion of Warren, C.J.); Parker v. Ellis, 258 F.2d 937, 941 (5th Cir. 1958) (dissenting opinion), *cert. dismissed as moot*, 362 U.S. 574 (1960). The majority admitted that the facts stated in the petition for certiorari made an "impressive . . . showing for the exercise of this Court's discretionary jurisdiction . . . ." Parker v. Ellis, 362 U.S. at 575.

[3] Unreported.

[4] Parker v. Ellis, 258 F.2d 937 (5th Cir. 1958).

[5] Parker v. Ellis, 359 U.S. 924 (1959). See also Parker v. Ellis, 359 U.S. 951 (1959) (appointment of counsel).

[6] Petitioner was released from custody for good behavior after serving almost five years of his seven-year sentence. His release came more than three years after the Supreme Court had denied certiorari in his original collateral attack in the state courts and he had applied to the federal district court for relief, seven months after his second petition for certiorari was filed, and three months after certiorari was granted. Had petitioner not been released from prison, his cause would have been adjudicated.

[7] See TEX. ELECTION CODE art. 5.01(4) (1952).

the writ of certiorari, holding that the termination of petitioner's custody had rendered the case moot [8] and had thereby deprived the Court of "jurisdiction to deal with the merits of petitioner's claim." [9] Four Justices dissented.[10] *Parker v. Ellis*, 362 U.S. 574 (1960).[11]

Historically, habeas corpus has been a procedure for inquiring into the legality of a prisoner's detention.[12] At common law the writ would not issue without a showing of restraint on the petitioner's liberty.[13] The federal habeas corpus statute,[14] which codifies the common-law writ,[15] provides that "the writ of Habeas Corpus shall not extend to a prisoner unless . . . [*inter alia*] he is in custody in violation of the Constitution or laws or treaties of the United States . . . ." [16] In consonance with this provision the federal courts have held that they have no jurisdiction to inquire into the validity of a petitioner's conviction when he is free on bail,[17] or has not yet begun to serve his sentence,[18] or has been released on

[8] The grounds are discussed in text accompanying note 40 *infra*.

[9] While joining in the Court's opinion, Justices Harlan and Clark concurred for the further reason that outstanding convictions against the petitioner in other states would equally deprive him of voting rights under Texas law, and therefore the case did not present a case or controversy within the meaning of article III of the Constitution. See notes 37-39 *infra*.

[10] Mr. Justice Douglas (joined by Chief Justice Warren) dissented on the ground that a writ of habeas corpus *nunc pro tunc* was a proper remedy under the facts of the case. The Chief Justice authored a second dissenting opinion (joined by Justices Black, Douglas, and Brennan) which assumed *arguendo* that habeas corpus *nunc pro tunc* was not available, but contended that the Court nevertheless had jurisdiction to provide an appropriate remedy, issuance of the writ itself no longer being necessary. *But cf.* note 45 *infra*.

[11] The case was remanded with instructions that the court of appeals vacate its judgment and direct the district court to vacate its order and dismiss the application. This disposition eliminates any precedential force of the original dismissal on the merits. See Comment, *Disposition of Moot Cases by the United States Supreme Court*, 23 U. CHI. L. REV. 77 (1955).

[12] See McNally v. Hill, 293 U.S. 131, 136-37 (1934). See also 9 HOLDSWORTH, A HISTORY OF ENGLISH LAW 118 (3d ed. 1944); INGERSOLL, THE HISTORY AND LAW OF THE WRIT OF HABEAS CORPUS 1 (1849).

[13] See 9 HOLDSWORTH, *op. cit. supra* note 12, at 108-25; INGERSOLL, *op. cit. supra* note 12, at 1-46. See generally HURD, HABEAS CORPUS (1858).

[14] 28 U.S.C. §§ 2241-55 (1958).

[15] See McNally v. Hill, 293 U.S. 131, 136 (1934); Sunal v. Large, 157 F.2d 165, 168 (4th Cir. 1946), *aff'd*, 332 U.S. 174 (1947); *Ex parte* Stewart, 47 F. Supp. 415, 417 (S.D. Cal. 1942). Note that the words "for the purpose of an inquiry into the cause of restraint of liberty" in 36 Stat. 1167, ch. 229 (1925), were omitted from the current statute as merely descriptive of the writ. See H.R. REP. No. 308, 80th Cong., 1st Sess. A178 (1948) (app.). See also Stallings v. Splain, 253 U.S. 339 (1920); Wales v. Whitney, 114 U.S. 564 (1885). However, the Supreme Court has substantially enlarged the scope of inquiry under habeas corpus proceedings. See Note, *The Freedom Writ—The Expanding Use of Federal Habeas Corpus*, 61 HARV. L. REV. 657, 660-62 (1947).

[16] 28 U.S.C. § 2241(c)(3) (1958).

[17] See Johnson v. Hoy, 227 U.S. 245 (1913); United States *ex rel.* Potts v. Rabb, 141 F.2d 45 (3d Cir.), *cert. denied*, 322 U.S. 727 (1944).

[18] See McNally v. Hill, 293 U.S. 131 (1934); Dodd v. Peak, 47 F.2d 430 (D.C. Cir. 1931); Mabry v. Beaumont, 290 Fed. 205 (9th Cir. 1923).

parole.[19] In addition, the courts of appeals have refused to review habeas corpus cases in which the petitioner has been released from custody while the appeal is pending.[20] And the Supreme Court has consistently denied certiorari if the petitioner is no longer in the custody of the particular respondent.[21]

Congress has provided another avenue of attack for prisoners incarcerated under federal convictions. This provision, section 2255 of the Judicial Code,[22] permitting a motion to vacate, modify, or set aside a sentence, is intended to be used in lieu of the traditional writ as the normal means of collateral attack upon federal convictions.[23] Although section 2255 retains the "in custody" requirement of the habeas corpus statute as a prerequisite to the exercise of jurisdiction, the Court held in *Pollard v. United States*[24] that the cause of a petitioner who had been released from custody after certiorari had been granted but before the case could be decided was not moot and could still be disposed of on the merits, since petitioner still suffered from possible unspecified collateral consequences of his conviction.[25] But in *Heflin v. United States*,[26] when a petitioner sought relief from a conviction before he had even started to serve the sentence under it, a majority of the Court,[27] ignoring *Pollard*, simply stated

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[19] See Factor v. Fox, 175 F.2d 626 (6th Cir. 1949); Van Meter v. Sanford, 99 F.2d 511 (5th Cir. 1938). The disposition of these cases may rest either on the fact that the petitioner was not sufficiently restrained for the writ to issue, or on the more technical ground that the control to which petitioner was subjected while on parole was not exercised by respondent jailer. See Van Meter v. Sanford, *supra*. If a petitioner, after completing a sentence based on an allegedly invalid conviction, is subsequently taken into custody pursuant to a multiple-offender statute, habeas corpus jurisdiction again attaches and the writ is available to attack the prior conviction. United States *ex rel.* Savini v. Jackson, 250 F.2d 349 (2d Cir. 1957); New York *ex rel.* Bowers v. Fay, 171 F. Supp. 558 (S.D.N.Y. 1958), *aff'd sub nom.*, United States *ex rel.* Bowers v. Fay, 266 F.2d 824 (2d Cir. 1959). See Reitz, *Federal Habeas Corpus: Postconviction Remedy For State Prisoners*, 108 U. PA. L. REV. 461, 488-89 (1960).

[20] See, *e.g.*, Witte v. Ferber, 219 F.2d 113 (3d Cir. 1955); United States v. Dixon, 199 F.2d 753 (8th Cir. 1952); Factor v. Fox, *supra* note 19.

[21] Zimmerman v. Walker, 319 U.S. 744 (1943) (release); Tornello v. Hudspeth, 318 U.S. 792 (1943) (pardon); Weber v. Squier, 315 U.S. 810 (1942) (parole). Similarly the Court denied a prisoner leave to petition for a writ of habeas corpus when it was clear that before the return could be made the prisoner's sentence would expire. *Ex parte* Baez, 177 U.S. 378 (1900).

[22] 28 U.S.C. § 2255 (1958).

[23] The purpose of § 2255, whose remedy must be pursued in the court of sentencing rather than in the district of incarceration, is not to detract from the scope of habeas corpus, but merely to relieve the pressure of habeas corpus petitions in those districts in which federal penitentiaries are situated. See the thorough examination of the legislative history in United States v. Hayman, 342 U.S. 205, 210-19 (1952).

[24] 352 U.S. 354, 358 (1957).

[25] See note 39 *infra*.

[26] 358 U.S. 415 (1959).

[27] Mr. Justice Douglas's opinion for the Court said a majority of the justices believed custody to be essential to the Court's jurisdiction under § 2255. A concurring opinion identified the majority as consisting of Justices Frankfurter, Clark, Harlan, Whittaker, and Stewart. The case, however, was disposed of on its merits with another jurisdictional basis. See note 28 *infra*.

that relief under section 2255 is available only to prisoners in actual custody under the sentence they are attacking.[28]

The majority of the Court, in arriving at its decision in the instant case, relied on three denials of certiorari[29] in cases in which the petitioner had been released from custody before the Court had acted on his petition. Although the Court has frequently admonished that a denial of certiorari carries no judgment on the merits,[30] the majority explained that "it is precisely because a denial of a petition for certiorari without more has no significance as a ruling that an explicit statement of the reason for denial means what it says." [31] The Court concluded that since each of the three writs had been denied on the ground that the petitioner's release from the respondent's custody had rendered the cause moot,[32] the release of petitioner in the instant case after certiorari had been granted but before a decision could be rendered also deprived the Court of jurisdiction.[33] In reaching this conclusion, the Court relegated *Pollard,* a factually indistinguishable situation under the analogous section 2255, to footnote, dismissing it as an "unconsidered assumption" which had been subsequently overruled by *Heflin.*[34] Yet *Heflin,* although dealing with the same general problem as *Pollard*—the jurisdictional significance of the "in custody" phrase of section 2255—did not involve the peculiar mootness problem of that case and the present one. The issue in *Heflin* was the district court's jurisdiction at the outset, inasmuch as the petitioner there had not yet begun to serve the sentence under the conviction he sought to attack. Therefore, while a majority of the Justices indulged in general statements to the effect that custody was essential to jurisdiction,[35] the case does not

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[28] The Court did, however, extend relief under FED. R. CRIM. P. 35, which permits correction of an illegal sentence at any time. Such alternative relief was not available in *Pollard,* where the petitioner's claim was that he was not present at the sentencing as required by FED. R. CRIM. P. 43; the remedy there was resentencing, *cf.* Howell v. United States, 172 F.2d 213, *cert. denied,* 337 U.S. 906 (1949). See 4 BARRON, FEDERAL PRACTICE AND PROCEDURE § 2301, at 302 (1951). Relief under Rule 35 was, of course, not available in the instant case.

[29] Zimmerman v. Walker, 319 U.S. 744 (1943) (prisoner released from summary military detention); Tornello v. Hudspeth, 318 U.S. 792 (1943) (petitioner granted a presidential pardon); Weber v. Squier, 315 U.S. 810 (1942) (petitioner paroled).

[30] Maryland v. Baltimore Radio Show, 338 U.S. 912 (1950) (Frankfurter, J.); instant case at 588-90 (dissenting opinion of Warren, C.J.).

[31] Instant case at 576.

[32] The orders in the three cases followed a similar pattern: "Petition for writ of certiorari . . . denied on the ground that the cause is moot, it appearing that petitioner . . . [method of release specified] and that he is no longer in the respondent's custody." Weber v. Squier, 315 U.S. 810 (1942). See, substantially similar, Zimmerman v. Walker, 319 U.S. 744 (1943); Tornello v. Hudspeth, 318 U.S. 792 (1943). Why the Court in the instant case felt constrained to pin down the meaning of "moot" and place its holding on a broader ground than that the petitioner was no longer in the *respondent's* custody is not apparent.

[33] Compare *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1868).

[34] Instant case at 575 n.1. Compare note 36 *infra.*

[35] See note 27 *supra* and accompanying text.

provide a definitive answer to the question of whether jurisdiction, valid at its inception, may be lost—even after the granting of certiorari—because of the petitioner's release from custody.[36] The Court's summary rejection of *Pollard* in the instant case on such tenuous grounds would appear clearly unwarranted.

However, the Court's characterization of *Pollard* as an "unconsidered assumption," although cryptic, would appear quite accurate. In *Pollard,* the Court went right to the constitutional issue—whether petitioner's release from custody rendered the cause moot in the constitutional sense of case or controversy[37]—without considering the statutory problem. It concluded that the possibility[38] of collateral consequences—legally imposed disabilities, flowing from the conviction, which survive the completion of the sentence—satisfied the constitutional limitations on its jurisdiction.[39] In contrast, the Court in the instant case considered the question of mootness and petitioner's release from custody solely from the point of view of the statutory limitations of its jurisdiction under the "in custody" provision

[36] Indeed, if *Heflin* (invalid jurisdiction *ab initio*) did overrule *Pollard* (jurisdiction lost after commencement of the action), see text at note 34 *supra,* the close similarity between § 2255 and habeas corpus suggests that the instant case should be controlled by McNally v. Hill, 293 U.S. 131 (1934), a habeas corpus case on all fours with *Heflin.*

[37] See Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-41 (1937); Mills v. Green, 159 U.S. 651, 653 (1895); Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 337 (1816). See generally Diamond, *Federal Jurisdiction to Decide Moot Cases,* 94 U. PA. L. REV. 125 (1946); Note, 103 U. PA. L. REV. 772 (1955). Justices Harlan and Clark declared the instant case moot on this ground. They reasoned that petitioner's out-of-state convictions already deprived him of his voting rights under Texas law and therefore that a mere declaration of invalidity in this case would not help him in this respect. The dissenters attacked this premise, claiming the Texas law on the matter was not clear. Instant case at 592 (dissenting opinion of Warren, C.J.); *id.* at 598 n.5 (dissenting opinion of Douglas, J.). The crux of the Harlan-Clark position, nevertheless, is that petitioner can show no legal interest —no set of operative facts on which the proceeding could give effective relief to the petitioner as a party in the case. *Cf.* Doremus v. Board of Educ., 342 U.S. 429 (1952) (graduation of child rendered moot complaint that bible reading in public school was unconstitutional); St. Pierre v. United States, 319 U.S. 41 (1943) (certiorari dismissed where petitioner had already served sentence from which he was appealing). In St. Pierre v. United States, *supra,* the Court stated that petitioner had not "shown that under either state or federal law further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied. . . . The moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review." 319 U.S. at 43.

[38] Note that in the instant case petitioner alleged a specific disability—disenfranchisement under Texas law. See note 7 *supra* and accompanying text. However, it is not clear whether invalidation of his conviction would have relieved this disability. See note 37 *supra.*

[39] 352 U.S. at 358. The Court in *Pollard* cited two cases to sustain its conclusion that the case was not moot in the constitutional sense of a case or controversy, see note 37 *supra* and accompanying text: United States v. Morgan, 346 U.S. 502 (1954) (proceeding in the nature of coram nobis attacking a federal conviction); Fiswick v. United States, 329 U.S. 211 (1946) (direct review of federal conspiracy conviction). Both opinions recognized the possible incurrence of civil disabilities as sufficient collateral consequences to sustain the cause after the prisoner had been released from custody. Only Fiswick v. United States, *supra,* however, spoke of any specific consequences: a weakening of the prisoner's defense against foreseeable deportation proceedings and an increased difficulty in obtaining citizenship papers which his outstanding conviction would cause. 329 U.S. at 222. See generally Note, 59 YALE L.J. 786 (1950). It would appear, therefore, that *Pollard* and the above-mentioned cases considerably undermine, if not overrule, the *St. Pierre* decision, see note 37 *supra.*

of the habeas corpus statute.[40] In this context the existence of an interest in the litigation sufficient to satisfy the constitutional limitations on the Court's jurisdiction is not determinative; rather, the question is whether the cause remains one which the habeas corpus statute may properly be invoked to adjudicate.

Nevertheless, it does not necessarily follow that the Court's assumption of statutory jurisdiction in *Pollard* was erroneous. Indeed, it is arguable that the "in custody" phrase of section 2255 and the habeas corpus statute should be treated like any other congressionally imposed jurisdictional requirement and be subject to the general rule that subsequent events do not deprive federal courts of statutory jurisdiction validly acquired at the outset.[41] However, there is a fundamental distinction between the usual jurisdictional requirement—such as the amount in controversy or the citizenship of the parties—and the custody requirements of section 2255 and the habeas corpus statute. The distinction lies in the nature of the relief sought and the relation of the jurisdictional requirement to the court's power to grant that relief. In the case of a civil action for damages, for example, the *ability* of the court to grant the relief sought is in no way affected by subsequent events which change the operative facts as to damages upon which the court's jurisdiction was originally predicated.[42] In the case of habeas corpus, however, the relief sought is so conjoined to the fact which establishes jurisdiction at the outset[43] that the prerequisite of jurisdiction—the custody of the petitioner—must continue to be met throughout the course of the action[44] in order for the relief sought—petitioner's release—to be effective.[45] This analysis implicitly accepts the historical limitations on the

[40] See generally ROBERTSON & KIRKHAM, JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES, § 293 (Wolfson & Kurland ed. 1951).

[41] See, *e.g.*, Smith v. Sperling, 354 U.S. 91 (1957) (diversity of citizenship destroyed); St. Paul Mercury Indem. Co. v. Red Cab Co., 303 U.S. 283 (1938) (amount in controversy diminished below jurisdictional amount); Hurn v. Oursler, 289 U.S. 238 (1933) (federal ground upon which jurisdiction was predicated found lacking in substance). See also Anderson-Thompson, Inc. v. Logan Grain Co., 238 F.2d 598 (10th Cir. 1956) (federal jurisdiction determined when complaint filed). For an application of this principle to a habeas corpus proceeding, see United States *ex rel.* Circella v. Neelly, 115 F. Supp 615 (N.D. Ill. 1953). "Constitutional" mootness, of course, will oust a federal court of jurisdiction whenever it is recognized.

[42] See St. Paul Mercury Indem. Co. v. Red Cab Co., *supra* note 41.

[43] The "in custody" requirement is not codified in 28 U.S.C. § 2254 (1958) as a condition precedent to habeas corpus jurisdiction; rather it is contained in the list of causes for which federal habeas corpus may issue in 28 U.S.C. § 2241(c) (1958).

[44] Compare the jurisdictional limitations pertaining to the equity jurisdiction of the federal courts: frequently in equity the relief sought can be of aid to the petitioner only so long as there is a physical object or particular transaction upon which the court's order can have an effect. See, *e.g.*, Wingert v. First Nat'l Bank, 223 U.S. 670 (1912) (appeal from decree refusing to enjoin the construction of a new building dismissed when the building was completed); Brill v. General Industrial Enterprises, Inc., 234 F.2d 465 (3d Cir. 1956) (appeal from decree refusing to enjoin sale of corporate assets dismissed after sale consummated).

[45] Chief Justice Warren's dissent asserted that the habeas corpus remedy could be beneficial in the instant case even though petitioner was already released from his allegedly illegal imprisonment. This assertion assumes that the Court may formulate remedies other than release and that after issuance of the writ becomes unnecessary because petitioner has been released, the "in custody" requirement ceases to operate to deprive the court of power to formulate a remedy, since the statute requires the

remedy provided by the writ of habeas corpus.[46] But the broadened scope of inquiry which the Court has permitted in habeas corpus proceedings [47]—a clear departure from the writ's history—makes it uncomfortable to try to explain the Court's rejection of *Pollard* in terms of a slavish subservience to traditional notions about the writ. If the statute, interpreted in light of the history of habeas corpus, is as compelling as the Court suggests, it would seem not only that *Pollard*'s "unconsidered assumption" of statutory jurisdiction was clearly erroneous, but that the entire *Pollard* court completely missed the controlling jurisdictional point in the case.[48]

It is possible only to speculate about the unarticulated reasons which may have motivated the Court in the instant case to retreat from the position taken in *Pollard*. Factually the cases are indistinguishable, except that Pollard was attacking a federal conviction whereas the petitioner in the instant case sought to upset a state proceeding. It may well be that the reason lies in that distinction. Perhaps the Court is more willing to construe its jurisdictional limitations liberally when the scope of the demanded inquiry lies wholly in the federal system than when the inquiry would probe state judicial processes. But the similarity of section 2255 and habeas corpus makes it awkward to limit the precedential value of *Pollard* to collateral attacks under section 2255.[49] The unconsidered part of *Pollard* would appear to be not so much its assumption of jurisdiction as its utter failure to appreciate the ramifications of its conclusion. The prospect which the Court faced in the present case was either to expand jurisdiction under the habeas corpus statute or to contract jurisdiction under section 2255. The common-law fiber of the habeas corpus statute [50] and the explicit statutory limitations upon the writ's issuance would appear to support the Court's choice. The power of the federal courts to issue the writ, even where the petitioner is in custody, is not unfettered: exhaustion of state remedies is a prerequisite to federal jurisdiction; [51] thus federal intervention may be invoked only after the state itself has failed to cure a denial of federal rights. This limitation may disclose an intention that the

court to "dispose of the matter as law and justice require." 28 U.S.C. § 2243 (1958). The main failing of this argument is that it does not comport with the traditional notion that the writ itself is the remedy, that the writ's function is to get the prisoner released from detention, and that any other relief is ancillary. See McNally v. Hill, 293 U.S. 131, 139 (1934). However, even assuming the dissenters' departure from tradition may be warranted under the circumstances, they fail to specify what sort of relief they would grant the petitioner. Justice Douglas, in his dissent, suggests that the proper remedy is a writ of habeas corpus *nunc pro tunc*. Instant case at 598-99. But how this would function is left unanswered.

[46] See notes 12-15 *supra* and accompanying text.

[47] See Note, *supra* note 15.

[48] Although four Justices dissented in *Pollard*, they did not raise the statutory problem; rather, they disagreed with the Court's holding on the merits. 352 U.S. at 363.

[49] See notes 22-23 *supra* and accompanying text. In fact, the *Pollard* decision has been followed in a habeas corpus attack on a state conviction, Dickson v. Castle, 244 F.2d 665 (9th Cir. 1957).

[50] See notes 12-15 *supra* and accompanying text.

[51] See note 1 *supra*.

federal courts should act only in the direst cases,[52] thereby mitigating the irritation which inevitably results from federal scrutiny of state processes.[53] The cryptic phrase "in custody," when illuminated by the history of the Great Writ, seems to be another limitation on federal power. For, while the price of federal scrutiny—measured by its chafing effect on federal-state relations—may be well spent when a denial of constitutional rights is still resulting in restraint on the petitioner's physical liberty, the same price may be excessive when only the collateral consequences of a denial remain.[54] It is disturbing that any deprivation of constitutional rights should go unremedied.[55] But, however more satisfying the result in *Pollard* may be, other considerations seem to dictate the Court's retreat from that position in habeas corpus cases. Until Congress manifests a clearer intention[56] that federal courts should enjoy broader powers to protect federal rights, the Court appears bound to limit their habeas corpus jurisdiction to cases involving continuing restraints of liberty.[57]

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[52] See Wade v. Mayo, 334 U.S. 672, 679-80 (1948); *Ex parte* Hawk, 321 U.S. 114, 117 (1944). 28 U.S.C. § 2254 (1958) is declaratory of the judge-made rule as to exhaustion of state remedies enunciated in *Ex parte* Hawk, *supra*. H.R. REP. No. 308, 80th Cong., 1st Sess. A180 (1947) (app.); see Parker, *Limiting the Abuse of Habeas Corpus*, 8 F.R.D. 171, 178 (1949).

[53] *Report of the Habeas Corpus Committee of the Conference of Chief Justices* (1954), in *Hearings on H.R. 5649 Before Subcommittee No. 3 of the House Committee on the Judiciary*, 84th Cong., 1st Sess. 108, 109 (1955). See Reitz, *Federal Habeas Corpus: Postconviction Remedy For State Prisoners*, 108 U. PA. L. REV. 461, 524 (1960). See generally Beverly, *Federal-State Conflicts in the Field of Habeas Corpus*, 41 CALIF. L. REV. 483 (1953).

[54] See generally Rogge & Gordon, *Habeas Corpus, Civil Rights, and the Federal System*, 20 U. CHI. L. REV. 509 (1953).

[55] Especially when the blame lies with delays in the federal courts. See note 6 *supra*.

[56] The Court has followed a discernible policy of construing narrowly jurisdictional statutes which impinge on state judicial process. See Thomson v. Gaskill, 315 U.S. 442, 446 (1949) (diversity statute strictly construed); Indianapolis v. Chase Nat'l Bank, 314 U.S. 63, 76-77 (1941) (same); Healy v. Ratta, 292 U.S. 263, 270 (1934) (federal question statute strictly construed); Matthews v. Rodgers, 284 U.S. 521, 525-26 (1932) (federal courts' equity power strictly limited). In Healey v. Ratta, *supra*, Mr. Justice Stone, speaking for the Court, said: "Due regard for the rightful independence of state governments, which should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined." 292 U.S. at 270.

[57] In the light of the instant case, the present habeas corpus statute is clearly inadequate to meet the problem of post-sentence civil disabilities imposed by the states. Certainly these represent deprivations of liberty in its broadest sense. See generally, Holtzoff, *Loss of Civil Rights by Conviction of Crime*, Fed. Prob., April-June 1942, p. 18; Note, 37 VA. L. REV. 105 (1951). This problem is compounded by the lengthy process of appeal in the federal courts, see note 6 *supra*. These circumstances call for Congress to act. The most obvious way of meeting the problem would be to amend the habeas corpus statute. But the historical notions of the Great Writ and its function suggest the desirability, if not the need, for another approach. A possible solution would be to amend the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1958). Since this act, as presently interpreted, neither augments nor diminishes federal jurisdiction, Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 669 (1950), a plaintiff must not only present a justiciable controversy but also fit his case within one of the existing federal jurisdictional statutes. See generally 6 MOORE, FEDERAL PRACTICE ¶ 57.23 (2d ed. 1953). Any amendment in this area, therefore, would require the enactment of a substantive, rather than a procedural, declaratory judgment provision.

MUNICIPAL LAW—Township May Not Withdraw From Landfill Authority Without Consent of Other Members

The township of Warrington is one of seven municipalities comprising the Central Bucks Sanitary Landfill Authority, a public corporation formed pursuant to the Pennsylvania Municipal Authorities Act of 1945.[1] The authority was established in 1956 by a voluntary agreement entered into by the governing bodies of each of the seven municipalities for the purpose of providing for garbage and trash disposal. After its inception, the authority acquired land and equipment and commenced disposal and landfill operations, financing itself both by charging for services and by assessing member municipalities. Early in 1960, the Board of Supervisors of Warrington Township determined to withdraw from the authority and submitted to the Authority Board a resolution to that effect. The Authority Board refused to consent to Warrington's withdrawal, and a complaint in mandamus was brought to compel that consent. Preliminary objections by the defendant authority were sustained, and the court dismissed the action, holding the grant or denial of consent to be discretionary with the Board. *Township of Warrington v. Central Bucks Sanitary Landfill Authority*, 10 Bucks 181 (Pa. C.P. 1960).

A municipal authority in Pennsylvania may be organized only as provided by the Municipal Authorities Act.[2] Under this act it is possible to establish governmental units which cross political boundaries without further state enabling legislation or special municipal elections. The act permits one or more municipalities [3] to form authorities for a wide range of self-supporting projects connected with public welfare and improvement.[4] Any deficit financing must be by authority revenue bonds,[5] and the credit of the municipalities is not to be pledged to support the bond issue.[6] The statute also sets forth the steps necessary for organization [7] and regu-

[1] Municipal Authorities Act of 1945, Pa. Stat. Ann. tit. 53, § 303 (1957). This act is derived from the Municipal Authorities Act, Pa. Laws 1935, act 191, the first Pennsylvania legislation of this type.

[2] Pa. Stat. Ann. tit. 53, §§ 301-22 (1957).

[3] Pa. Stat. Ann. tit. 53, § 303A (1957).

[4] Pa. Stat. Ann. tit. 53, § 306A (1957).

[5] Pa. Stat. Ann. tit. 53, § 306B(i) (1957). It is this feature which forms the basis of the popularity of the authority form in Pennsylvania and elsewhere, for, when combined with the dictate that the credit of the municipality not be pledged, note 6 *infra*, it is possible to circumvent constitutional debt limitations. Note, 55 Dick. L. Rev. 141 (1950). Technically, these bonds, if payable from the whole of the authority's revenue sources, may be general obligation bonds. The designation "revenue bonds" is, however, accurate for practical purposes and is the commonly used term. See Fordham, *Revenue Bond Sanctions*, 42 Colum. L. Rev. 395, 399-400 (1942).

[6] Pa. Stat. Ann. tit. 53, § 306C (1957).

[7] Pa. Stat. Ann. tit. 53, § 303 (1957). The most important step is the passing of resolutions of intention by the governing boards of the municipalities which wish to form the authority. Once such resolutions are passed, only filing requirements remain. It should be noted that there is no requirement that the electorate ratify the governing board's decision. Compare note 12 *infra*.

lates the procedure for withdrawal before obligations have been incurred.[8] The present dispute concerned the provisions governing such withdrawal, for the procedural posture of the case admitted of no argument that obligations had been incurred.

The court in the instant case relied on three sentences of the statute in reaching its conclusion that a member's withdrawal is conditioned upon the consent of the Authority Board. The first sets out the privilege of withdrawal: "Whenever an Authority has been incorporated by two or more municipalities, any one or more of such municipalities *may* withdraw . . . ."[9] Reading the word "may" as here used in conjunction with its use in the following sentence, which provides for a municipality's entry into an already operating authority,[10] the court concluded that "may" could not be read so as to grant an absolute right to withdraw. In a third sentence, beginning with the clause "if the Authority shall by resolution express its consent to such withdrawal, or joining . . . ,"[11] the court found language clearly placing the ultimate decision in the authority itself rather than in each member municipality. The court's construction of the statute is compelling; it is hard to find in what the legislature has said an absolute right in a member to withdraw unilaterally.[12] Under Pennsyl-

[8] PA. STAT. ANN. tit. 53, § 304A (1957) provides that "whenever an Authority has been incorporated by two or more municipalities, any one or more of such municipalities may withdraw therefrom, but no municipality shall be permitted to withdraw from any Authority after any obligation has been incurred by the Authority . . . . If the Authority shall by resolution express its consent to such withdrawal . . . [certain procedural steps shall be followed]." In the instant case, the municipality alleged that no obligations had been incurred. Defendant's pleadings being in the nature of a demurrer, it was not necessary to decide the meaning of the term "obligations" as used in the statute. No case has yet construed the term, which appears to have two possible meanings: first, it might refer only to the issuance of bonds; or, second, it might encompass any debt or duty whatsoever, express or implied.

[9] PA. STAT. ANN. tit. 53, § 304A (1957). (Emphasis added.) A municipality cannot withdraw if the authority has already incurred obligations.

[10] *Ibid.*

[11] *Ibid.*

[12] Many other states have established authority plans, but the range of governmental mechanisms employed to implement the aims of the plans is wide. For example, in Illinois, a drainage district, which may extend over more than one county, may be formed under one alternative by agreement between land owners or as a result of a special election. ILL. ANN. STAT. ch. 42, § 3-1 (Smith-Hurd 1956). In California, unincorporated areas may form, by election, community services districts for general purposes. CAL. GOV'T CODE §§ 61100-43, 61600. In Kentucky, a park, playground, or recreation area may be developed by joint action upon a vote of the legislative bodies involved. KY. REV. STAT. § 97.035 (1959). Such interdistrict plans as the Miami and Seattle "metros" and the Toronto federation are essentially political in nature and thus relevant only insofar as they reflect the generally permanent nature of authorities. For a discussion of many aspects of such a metropolitan plan, see Municipality of Metropolitan Seattle v. City of Seattle, 357 P.2d 863 (Wash. 1960). While many authority schemes require elections at some point in the formative process, Pennsylvania's act does not. The requirement is usually directed only to a majority of the electors in the district to be formed, a provision which destroys local identification and removes the danger of the subsequent withdrawal of dissatisfied unitary "constituents." Few statutes speak to withdrawal, but most provide for dissolution, permitting such action to be taken only after the authority has served

vania's public school law relating to withdrawal from joint school districts and providing that a joint district may be discontinued [13] at any time by "a majority vote of the school directors of the respective [component] districts . . . . ," [14] an analogous result has been reached. There a court, interpreting a contractual jointure agreement in light of both the parties' and the legislative intent, refused to allow a member district to withdraw unilaterally after negotiations for a building had been completed, even though the agreement said there might be withdrawal before construction had begun.[15]

While the court's interpretation of the statute here was correct, shortcomings in the legislation are immediately apparent. It is practically impossible for a municipality to withdraw once it has signed the articles of incorporation, for in any case in which it would be to a member's advantage to withdraw it would likely be to the authority's advantage to deny consent. In view of the increasing dissatisfaction not only with the use of a single authority but with the repeated and ofttimes haphazard multiplication of authorities in a given locality,[16] it would seem that more leeway should be allowed for withdrawal prior to the time when obligations are incurred. Although the advantages of the authority method seem attractive at the outset,[17] it is only a partial solution of the problems facing modern municipalities. Many of these difficulties are created by political boundaries established years ago which now tend to decentralize the resources of the community and leave local government fragmented and not realistically

its purpose and has extinguished its debts. See, *e.g.*, S.D. CODE § 52.1776 (Supp. 1960) (consumer power districts). For a statute permitting withdrawal only before the election which will finally form the district, see N.Y. UNCONSOL. LAWS § 5938 (McKinney 1949).

[13] Withdrawal need not necessarily result in discontinuance where three or more districts are involved. *Cf.* Southeast Greene Joint School Dist. v. Dunkard Township School Dist., 396 Pa. 209, 152 A.2d 269 (1959).

[14] PA. STAT. ANN. tit. 24, § 17-1708 (1950). This provision has been held to require the consent of each member district for discontinuance. Berzonsky v. Marhefko, 17 Cambria 77, 87 (Pa. C.P. 1951). The required consent may be indicated in the agreement forming the jointure by limiting the life of the joint district to a given number of years. See Irwin Borough School Dist. v. Huntingdon Township School Dist., 358 Pa. 78, 55 A.2d 740 (1947).

[15] Southeast Greene Joint School Dist. v. Dunkard Township School Dist., 396 Pa. 209, 152 A.2d 269 (1959).

[16] See WEINTRAUB & PATTERSON, THE 'AUTHORITY' IN PENNSYLVANIA vii (1949); WOOD, SUBURBIA 248 (1958); McLean, *Use and Abuse of Authorities*, 42 NAT'L MUNIC. REV. 438 (1953); Martin, *'Therefore Is the Name . . Babel,'* 40 NAT'L MUNIC. REV. 70, 74 (1951); Shestack, *The Public Authority*, 105 U. PA. L. REV. 553, 567-69 (1957); Tobin, *The Metropolitan Special District: Intercounty Metropolitan Government of Tomorrow*, 14 U. MIAMI L. REV. 333, 335 (1960).

[17] One authority has listed the advantages as follows: (1) the ability to cross political boundaries and unify functions and services; (2) independence from debt limitations; (3) more flexible, businesslike management; (4) incentive to efficiency caused by the necessity of living within its income; (5) greater continuity of management; (6) relative freedom from politics, resulting in higher grade men; (7) cost paid by users, proportionate to use. WEINTRAUB & PATTERSON, *op. cit. supra* note 16, at vii-ix. At the same time, it is recognized that each of these advantages contains inherent disadvantages. For example, relative freedom from politics results in a decrease in responsibility to the public, and the ability to cross political boundaries postpones the development of a unified metropolitan administration. *Ibid.*

related in extent of jurisdiction to actual service areas.[18] But the authority, devised as a means of sweeping over such boundaries and relating governmental attack on community problems to the actual reach of those problems,[19] paradoxically adds another line to the already confused organizational chart of local government structure.[20] This proliferation is intensified where several authorities are formed within a single area, each primarily concerned with its own *raison d'être*.[21] Not the least of the faults of the authority is its relative immunity from public control,[22] its board being an appointive body and thus only indirectly responsible to the electorate. Nowhere is this better illustrated than in Pennsylvania, where there is no point at which the voters may disapprove the operation of an authority. Furthermore, the length of an authority agreement may be inordinately long, permitted as it is by statute to run for fifty years.[23] These considerations indicate the desirability of permitting, even after the authority has been formed, effective reconsideration by a municipality of its decision to enter into an agreement. This can only be done by placing the discretion to withdraw in the member municipality. Despite the fact that a unilateral withdrawal might lead to disruption and perhaps even the collapse of a proposed project or of the authority itself, it seems on balance that in the early stages of an authority's organization the center of power should remain the individual municipality rather than the creature it has created. As the criticisms of the authority scheme indicate, careful consideration of each step and a full appreciation of all its implications should accompany the pursuit of an authority project once conceived; a municipality should not be firmly bound until obligations have been incurred—when more becomes involved than the desires, or even best interests, of the individual municipalities. The legislature, having demonstrated a willingness to allow pre-obligation withdrawal, should provide measures to make that privilege effective.

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[18] Nehemkis, *The Public Authority: Some Legal and Practical Effects*, 47 YALE L.J. 14, 31 (1937).

[19] The companion reason for resort to authorities—the need to avoid constitutional debt restrictions—no longer exists in some situations in Pennsylvania. Municipalities may issue nondebt revenue bonds for some projects, *e.g.*, sewer and electrical systems, provided the credit of the municipality is not pledged, no debt is created, no charge against general revenues is made, and no lien attaches to any governmental property. PA. STAT. ANN. tit. 53, § 47495(a) (1957), Beam v. Ephrata Borough, 395 Pa. 348, 149 A.2d 431 (1959). See generally Municipal Serv. Letter, April 1959, p. 4.

[20] McLean, *supra* note 16, at 441; Nehemkis, *supra* note 18, at 31; Shestack, *supra* note 16, at 567.

[21] WOOD, SUBURBIA 248, 252 (1958); Martin, *supra* note 16, at 74. To combat this defect, multifunctional special districts have been suggested. Nehemkis, *supra* note 18, at 31; Tobin, *supra* note 16, at 335. For criticism of such a district, see Netherton, *Area-Development Authorities: A New Form of Government by Proclamation*, 8 VAND. L. REV. 678, 689-90 (1955).

[22] WEINTRAUB & PATTERSON, *op. cit. supra* note 16, at 7; McLean, *supra* note 16, at 442-43; Netherton, *supra* note 21, at 696.

[23] PA. STAT. ANN. tit. 53, § 305A(2) (1957).

PRIVILEGED COMMUNICATIONS—FEDERAL COURT LOOKS TO STATE LAW OF ATTORNEY-CLIENT PRIVILEGE IN ACTION TO COMPEL TESTIMONY BEFORE INTERNAL REVENUE SERVICE

An agent of the Internal Revenue Service summoned[1] the defendant, an attorney, to identify certain clients for whom he had made an anonymous payment of back taxes. Upon defendant's refusal to reveal the taxpayers' identity on the ground of the attorney-client privilege, the IRS petitioned a federal district court to enforce the summons and compel defendant's testimony.[2] The court overruled defendant's motion to dismiss based on the claimed privilege and held him in civil contempt after he declined to name his clients in open court upon being asked to do so by the judge.[3] The court of appeals reversed, holding that the law of the forum-state "should and does control" the question of privilege in a civil action to compel testimony, and that under California law a client's identity is privileged information when its disclosure could be used " 'for the purpose of showing an acknowledgment of guilt on the part of such client of the very offenses on account of which the attorney was employed . . . .' "[4] *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960).

Previous decisions in actions to enforce IRS summonses and compel attorney-defendants to testify at tax investigations, by deciding questions as to the scope of the asserted attorney-client privilege, have implicitly recognized the existence of that privilege in administrative proceedings.[5] However, these cases did not clearly present questions as to the source—state or federal—of the attorney-client privilege in IRS investigations. This problem was first articulated in *Falsone v. United States*,[6] which dealt with the privilege of communications between accountant and client. An accountant had resisted turning over to the IRS certain books for which he claimed his client's privilege under the law of Florida, the situs of the transactions concerning which information was sought. Affirming an order compelling production of the documents, the court of appeals declared that

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[1] INT. REV. CODE OF 1954, § 7602.

[2] INT. REV. CODE OF 1954, §§ 7402(b), 7604(b).

[3] Koerner v. Baird, 59-2 U.S. Tax Cas. 73218, 73223 (S.D. Cal., 1959), *rev'd in part*, 279 F.2d 623 (9th Cir. 1960). Paradoxically, the lower court found that the defendant did not know the identity of his clients, *id.* at 73221; he had dealt exclusively with his clients' accountants and attorney. The trial court's refusal to order the defendant to name the accountants and the lawyer with whom he had dealt was affirmed by the court of appeals on the government's cross-appeal. 279 F.2d at 635. As to the substance of the court's holding—that the clients' identities were privileged under the facts of the case—see 47 VA. L. REV. 126 (1961).

[4] Baird v. Koerner, 279 F.2d at 633, quoting 97 C.J.S. *Witnesses* § 283, at 803 (1957).

[5] United States v. Sale, 228 F.2d 682 (8th Cir.), *cert. denied*, 350 U.S. 1006 (1956); Chapman v. Goodman, 219 F.2d 802 (9th Cir. 1955); United States v. Boccuto, 175 F. Supp. 886 (D.N.J.), *appeal dismissed per curiam for want of jurisdiction*, 274 F.2d 860 (3d Cir. 1959); Gretsky v. Miller, 160 F. Supp. 914 (D. Mass. 1958); Application of House, 144 F. Supp. 95 (N.D. Cal. 1956); United States v. Willis, 145 F. Supp. 365 (M.D. Ga. 1955).

[6] 205 F.2d 734 (5th Cir.), *cert. denied*, 346 U.S. 864 (1953).

the question before the district court had been the scope of privilege in an administrative tax inquiry. Therefore, even assuming that the proceedings in the district court were controlled by the Federal Rules of Civil Procedure,[7] and that Rule 43(a), governing the admissibility of evidence, would require recognition of a state-sanctioned privilege in the enforcement action, state law could not extend to nor affect the district court's decision to order testimony before the IRS. A tax investigation, the court assumed, may be "subject to the same testimonial privileges as judicial proceedings";[8] but, without clarifying to which "judicial proceedings" it was alluding,[9] the court held that federal and not state law should govern the scope of the privilege issue presented. In rejecting the defendant's claim as to the documents in his possession, the court evoked the concept of federal law as governing privilege questions in IRS investigations only to demonstrate the inapplicability by its own force of the state privilege statute asserted by defendant. The court did not discuss the source of the substantive rules by which federal privilege law should be elaborated—whether they should be fashioned by federal judges using common-law techniques, or should be expressly taken up from state law deemed compatible with the federal scheme.

In *In re Albert Lindley Lee Memorial Hospital*,[10] the IRS sought to require a hospital to reveal the names of patients admitted under the care of a physician who was being investigated.[11] The court of appeals, although affirming the decision below in favor of the IRS, rejected the district court's opinion that state law should control, and expressly adopted the statement in *Falsone* that federal law governs the extent of privilege in a tax investigation.[12] The court reiterated *Falsone's* assumption that an administrative inquiry "is subject to the same testimonial privileges as judicial proceedings,"[13] without analyzing whether all judicial proceedings in which the defendant's testimony might be called for would recognize the same scope of privilege.[14] Apparently assuming that the only relevant "proceeding" would arise in New York, as had the IRS investigation, and in a federal court which would adopt state privilege under Rule 43(a), the court was willing to look to the substance of state law and found no quarrel with the district court's holding that the information sought was without the scope of New York's doctor-patient privilege.[15]

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[7] See FED. R. CIV. P. 81(a)(3).

[8] 205 F.2d at 738, citing McMann v. SEC, 87 F.2d 377, 378 (2d Cir.) (L. Hand, J.) (dictum), *cert. denied*, 301 U.S. 684 (1937).

[9] See note 31 *infra*.

[10] 209 F.2d 122 (2d Cir. 1953), *cert. denied*, 347 U.S. 960 (1954), 67 HARV. L. REV. 1272 (1954).

[11] The doctor was permitted to intervene in the proceeding, and on appeal it was assumed that he had standing to do so. 209 F.2d at 123.

[12] *Ibid.*

[13] *Id.* at 123-24 (dictum).

[14] See note 31 *infra*.

[15] See N.Y. CIV. PRAC. ACT §§ 352, 354.

The principal distinction between *Falsone* and *Lee Hospital* on the one hand and the instant case on the other lies in the conduct of the enforcement proceeding in the district court. In the earlier cases, the IRS sought documents and testimony and the judge ordered compliance before the IRS. The present case involved testimony only, and when the defendant failed to comply with the court's order to testify before the IRS, he was called back into court and asked by the judge to reveal the names of his clients in court.[16] Since the trial court held the information required to answer *its* question unprivileged, it had no occasion to pass on the issue of defendant's privilege before the IRS. Thus the question answered in *Falsone* and *Lee Hosptial*—what law governs privilege in a federal administrative investigation—was not squarely before the court of appeals in the instant case.[17] Assuming the district judge had the power himself to ask the ultimate question in court,[18] he was not compelled to by statute, and need not have. Thus the decision of the instant case that state privilege law governs seems to make the defendant's right to refrain from answering turn on the fortuity of where the question is asked, and whether the judge decides to ask it. If the law of privilege in court differs from that in the administrative investigation, a privilege in one proceeding can be rendered nugatory by an order to testify in the other. As a practical matter the two privileges must be equivalent; consequently, the court's reliance on Rule 43(a) [19] and the other precedents it found persuasive [20] seems to have been misguided. While the federal rules no doubt applied to the enforcement proceeding

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[16] Koerner v. Baird, 59-2 U.S. Tax Cas. at 73223.

[17] The opinion of the court of appeals could be read as ignoring this distinction and deciding the question of privilege in the administrative proceeding. The facts of the case, however, preclude such a reading. See note 18 *infra*.

[18] This power is not expressly granted by either § 7402 or § 7604(b) of INT. REV. CODE OF 1954. § 7602(2) empowers the Secretary or his delegate "to summon . . . any . . . person the Secretary or his delegate may deem proper, to appear *before the Secretary or his delegate* . . . to give such testimony . . . as may be relevant . . . ." (Emphasis added.) § 7604(b), read in conjunction with § 7602, does not empower the district judge to order the testimony in court: when a summoned witness refuses to testify, "the Secretary or his delegate may apply to the judge of the district court . . . for an attachment against him as for a contempt. . . . [After "satisfactory proof" and a hearing] the judge . . . shall have the power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, *to enforce obedience to the requirements of the summons* and to punish such person for his default or disobedience." (Emphasis added.) If the trial judge in the second hearing of the instant case below did not have the power to require the defendant to answer the ultimate question, but was confined to allowing defendant to purge himself of his previous contempt, the judgment of contempt was merely a confirmation of that previous contempt. On either theory, the issue before the court of appeals would be the same. The questions of privilege as a defense to the court's demand and privilege in the related IRS proceeding are so closely related that one cannot reasonably be decided without reference to and decision of the other.

[19] Instant case at 628.

[20] *E.g.*, United States v. Pape, 144 F.2d 778 (2d Cir.), *cert. denied*, 323 U.S. 752 (1944) (federal criminal case); *Ex parte* Sparrow, 14 F.R.D. 351 (N.D. Ala. 1953) (proceeding to compel deposition under FED. R. CIV. P. 37(a)); Munzer v. Swedish Am. Line, 35 F. Supp. 493 (S.D.N.Y. 1940) (proceeding to set aside subpoena under FED. R. CIV. P. 45(d)(1)).

itself,[21] as to such matters as forms of pleadings,[22] time limits for motions, and "satisfactory proof" of the need to compel testimony,[23] the decisive issue to which the court should have directed its attention was whether or not the defendant was privileged to refrain from identifying his clients in the tax investigation.[24] Federal law has been held to govern this issue.[25] In deciding the content of this federal law—the precise scope of the asserted privilege—the court had the power to choose between adopting state law in the area and forging a federal common-law rule to be applied uniformly in all similar proceedings.[26] Important factors to be weighed in making such a choice are the inhibition which such a privilege would place upon effecting the congressional purpose in giving the IRS broad investigatory powers [27] and the countervailing problem of the impact of denying privilege in an administrative proceeding on attempting to protect it in a subsequent judicial action,[28] to which is related the danger of undermining state privilege.[29]

An adoption of state privilege law to govern IRS investigations might well give rise to evasive "forum shopping" by taxpayers such as those in the present case who, wishing to conceal their identities, could specially consult lawyers in states whose law would protect them in the event of investigations—perhaps in direct conflict with the purpose of the internal revenue law.[30] The rationale of the *Lee Hospital* dictum, that those priv-

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21 FED. R. CIV. P. 81(a)(3).

22 See Martin v. Chandis Sec. Co., 128 F.2d 731 (9th Cir. 1942).

23 See INT. REV. CODE OF 1954, § 7604(b).

24 See Falsone v. United States, 205 F.2d 734, 742 (5th Cir. 1953).

25 *Id.* (by implication); *cf. In re* Albert Lindley Lee Memorial Hospital, 209 F.2d 122, 123 (2d Cir. 1953).

26 See Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 798-801 (1957). See generally *id. passim.*

27 See Mishkin, *supra* note 26, at 805-06.

28 See generally 67 HARV. L. REV. 1272 (1954).

29 See Weinstein, *Recognition in the United States of the Privileges of Another Jurisdiction*, 56 COLUM. L. REV. 535, 548 (1956).

30 That would frequently be the result if the state law selected were consistently that of the forum: since the action to compel testimony must be brought in "the district in which such person resides or may be found," INT. REV. CODE OF 1954, § 7402, the question of whether to compel an attorney to testify before the IRS would usually arise before a district court sitting in the lawyer's home state; a prospective anonymous taxpayer would only have to find an attorney in a congenial jurisdiction in order to be protected. Since, however, state law does not govern the privilege issue of its own force, but is incorporated into the federal law by choice of the court, there is no compulsion for the court to choose the law of its state—it may choose any state law which has some rational connection to the transactions at issue. See Mishkin, *supra* note 26, at 806. The court might choose state law and yet, without achieving uniformity, fix any taxpayer's privilege to communicate with his attorney in such a way as to make "forum shopping" impossible; for example, the law of the taxpayer's domicile might be selected. The choice, however, seems strained. (Further, in a case like the present one, how is the court going to discover the taxpayer's domicile?) More interested in the communications between a lawyer and his client are the states in which the communication takes place and where the lawyer is admitted to practice. Thus, insofar as the court feels bound to prevent forum shopping, it can better fashion its own law of privilege than take up state law on the subject.

ileges should be recognized in an administrative proceeding which would conform to and not derogate from privileges allowed in subsequent judicial proceedings related to the inquiry, might be a strong counterargument for adopting state law if such actions always arise in state courts or in civil actions in federal district courts of the same state. Actually, there is considerable uncertainty as to which court will become the forum of any subsequent action, with consequent uncertainty as to what will be the applicable law of privilege.[31] In order to preserve privilege, then, a court would have to choose the law of the most restrictive forum into which the subject matter of the litigation might find its way. Such a result would subvert the broad powers of inquiry which Congress has vested in the IRS. Finally, any direct effect upon state privilege of an IRS inquiry like that in the instant case is likely to be slight. The attorney-client consultation in this case was entirely concerned with federal taxation, and the investigation was likewise limited to tax matters.[32] The denial of a privilege in this matter would have little of the inhibitory effect on frank and honest consultation about general legal matters which gives rise to state attorney-client privileges.[33] On balance, the desirability of a uniform privilege rule for tax investigations would appear to outweigh any deference of federal courts to state law and policy in this area.[34]

RESTRAINT OF TRADE—MANUFACTURERS' PRICE-FIXING AGREEMENT SUSTAINED UNDER BRITISH RESTRICTIVE TRADE PRACTICES ACT, 1956

Forty-four members of a manufacturers' trade association producing ninety per cent of Britain's black bolts and nuts fixed common prices for their products. Their agreement, registered pursuant to the Restrictive

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[31] See 67 HARV. L. REV. 1272, 1273 (1954): "For example, a proceeding in the Tax Court would be governed by the District of Columbia law of evidence, which recognizes a doctor-patient privilege . . . whereas in a criminal prosecution for fraudulent returns, the district court would apply a federal common law of privilege, and probably would not protect the relationship."

[32] Another complexity of the instant case results from the fact that defendant-attorney never dealt with his "clients," but only with the clients' attorney and accountants. Although it is arguable that state privilege might be threatened by a refusal to protect, in an entirely federal context, the relationship of a client and his "family lawyer," the dealings of that lawyer with a tax specialist for purposes of making an anonymous deficiency payment seem expressly designed to thwart the IRS, and are of questionable social value. *Cf.* Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 109-15 (1956).

[33] See Louisell, *supra* note 32, at 109-15.

[34] *Cf.* Mishkin, *supra* note 26, at 813-14.

Trade Practices Act of 1956,[1] was referred by the Registrar[2] to the Restrictive Practices Court,[3] a tribunal empowered to nullify and enjoin adherence to any trade restrictions it finds contrary to the public interest.[4] Under the act, a restrictive agreement is deemed contrary to the public interest unless the court is satisfied that it meets any of seven enumerated justifications and, further, that it is not "unreasonable," a determination to be made by balancing against its proven justifications any detriment to the public that may result from its operation.[5] In justification of the Black Bolt and Nut Association's agreement the court found that the resulting common price structure eliminated any need for commercial purchasers to "go shopping" for favorable prices. Since shopping adds to a purchaser's cost of doing business, its obviation, concluded the court, produces a saving which is—in the language of one of the statutory justifications—a "specific and substantial benefit" to the public.[6] On balance, because the court believed that the established prices would not be higher than those which free competition would determine,[7] the agreement was held not to be "contrary to the public interest." *In re Black Bolt & Nut Ass'n's Agreement*, L.R. 2 R.P. 50 (1960).

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[1] 4 & 5 Eliz. 2, c. 68, §§ 6 (specification of agreements subject to the act), 7-8 (agreements exempted, *e.g.*, certain restrictions concerning foreign commerce), 9-10 (registration requirement). For an authoritative explication of the statutory scheme see ALBERY & FLETCHER-COOKE, MONOPOLIES AND RESTRICTIVE TRADE PRACTICES (1956). See also Rhinelander, *The British Restrictive Trade Practices Act*, 46 VA. L. REV. 1 (1960); Stevens, *Experience and Experiment in the Legal Control of Competition in the United Kingdom*, 70 YALE L.J. 867 (1961). The exceptions to the registration requirement are discussed in ALBERY & FLETCHER-COOKE, *op. cit supra* at 19-31.

[2] The Registrar is an official "charged with the duty of preparing, compiling and maintaining a register of agreements which are subject to registration . . . and of taking proceedings before the Court . . . ." 4 & 5 Eliz. 2, c. 68, § 1(2).

[3] The Restrictive Practices Court, established to carry out the 1956 act, is composed of five judges and not more than ten lay members "qualified by virtue of . . . knowledge of or experience in industry, commerce or public affairs." 4 & 5 Eliz. 2, c. 68, § 4(1). See *Proceedings, International Conference on Control of Restrictive Business Practices* 12-13 (1960), for a brief account of the preenactment controversy over the composition of the court and the allocation of power.

[4] 4 & 5 Eliz. 2, c. 68, § 20(3).

[5] 4 & 5 Eliz. 2, c. 68, § 21(1).

[6] The particular justification relied on requires the court to be satisfied "that the removal of the restriction would deny to the public as purchasers, consumers or users of any goods . . . specific and substantial benefits or advantages enjoyed or likely to be enjoyed by them as such, whether by virtue of the restriction itself or of any arrangements or operations resulting therefrom . . . ." 4 & 5 Eliz. 2, c. 68, § 21(1)(b). The court, compelled for the first time to interpret the clause "to the public as purchasers, consumers or users," held that § 21(1)(b) could be satisfied by a showing that the public in any one of these capacities would be denied a specific and substantial benefit if the restriction were removed. Furthermore, the court held that commercial purchasers, even though intermediate in the distributive chain, are purchasers within the meaning of the act. Compare ALBERY & FLETCHER-COOKE, *op. cit. supra* note 1, at 45. It was also noted that if commercial purchasers' costs were to rise, higher prices to the ultimate consumers necessarily would result, since the overall level of manufacturers' prices would not respond to free competition in the industry. *In re* Black Bolt & Nut Ass'n's Agreement, L.R. 2 R.P. 50, 89-90 (1960). *But cf.* note 27 *infra*. Inasmuch as the court included commercial purchasers in the "public as purchasers" and a specific and substantial benefit to them satisfied the statute, its finding that removing the agreement would raise prices to the consuming public was unnecessary to its result.

[7] *In re* Black Bolt & Nut Ass'n's Agreement, *supra* note 6, at 89.

Until 1948 Britain had no legislation dealing with restrictive trade practices. The Monopolies and Restrictive Practices (Inquiry and Control) Act,[8] passed in that year, authorized investigation into the pervasiveness and effect of restrictive practices in the British economy. A Monopolies Commission was given broad discretion to consider "all matters which appear in the particular circumstances to be relevant" in determining whether particular agreements operated to the detriment of the public.[9] The 1948 act, reflecting a traditional British hesistancy to condemn restrictive agreements without regard to their effect,[10] produced different conclusions as to similar restrictions, because the Commission rested its decisions largely on the actual operations of the agreements in their industrial contexts.[11] In addition, the sanctions provided by the 1948 act were ineffective.[12] The Restrictive Trade Practices Act of 1956 [13] was Britain's first effective statutory scheme for controlling such practices. By declaring restrictive agreements presumptively contrary to the public interest and by limiting the permissible justifications, the 1956 act seemed to herald a less lenient, more doctrinaire attitude toward restrictive trade practices than its

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[8] 11 & 12 Geo. 6, c. 66.

[9] 11 & 12 Geo. 6, c. 66, § 14. "Public interest" was defined in the act, but only in very general terms: "[R]egard shall be had to the need, consistently with the general economic position of the United Kingdom, to achieve—(a) the production, treatment and distribution by the most efficient and economical means of goods of such types and qualities, in such volume and at such prices as will best meet the requirements of home and overseas markets; (b) the organisation of industry and trade in such a way that their efficiency is progressively increased and new enterprise is encouraged; (c) the fullest use and best distribution of men, materials and industrial capacity in the United Kingdom; and (d) the development of technical improvements and the expansion of existing markets and the opening up of new markets." *Ibid.*

[10] To date only one restrictive practice, collective resale price maintenance, has been made illegal *per se*. 4 & 5 Eliz. 2, c. 68, §§ 24-25. On the British attitude toward restrictive trade practices generally, see Cairns, *Monopolies and Restrictive Practices*, in LAW AND OPINION IN ENGLAND IN THE TWENTIETH CENTURY 173 (Ginsberg ed. 1959); Rostow, *British and American Experience with Legislation Against Restraint of Competition*, 23 MODERN L. REV. 477 (1960).

[11] *Compare* MONOPOLIES COMMISSION, REPORT ON THE SUPPLY OF INSULATED ELECTRIC WIRE AND CABLES ¶¶ 283, 287 (1952), approving price agreements as to rubber cable and covered conductors, *with id.* ¶¶ 150, 290, recommending termination of price fixing as to miscellaneous telephone cables and cords.

[12] Recommendations of the Monopolies Commission could be implemented in only two ways. The first was by a statutory order (which requires the approval of both houses of Parliament) prohibiting the restriction in question. Only one such order was issued: The Monopolies and Restrictive Practices Order, 1 STAT. INSTR., 1951, No. 1200, made it unlawful for two or more dental goods suppliers to agree to withhold supplies from dealers, where this might limit the number of dealers or maintain resale prices. Rhinelander, *supra* note 1, at 7. The second method provided was for the ministry in charge of the industry involved to seek voluntary cooperation of the industry in carrying out the Commission's recommendations. This procedure, while used more frequently, depended on the acquiescence of the parties to the agreement. Referring to recommendations made by the Monopolies Commission concerning the calico printing industry, which had been depressed for a considerable time, 171 ECONOMIST 303, 304 (1954), noted that the industry had "never taken kindly to lectures from London on how to perish in a decently competitive posture." See Grunfeld & Yamey, *United Kingdom*, in ANTI-TRUST LAWS 340, 384-87 (Friedmann ed. 1956), for an account of enforcement under the 1948 act.

[13] 4 & 5 Eliz. 2, c. 68.

statutory predecessor.[14] However, it was recognized that the omission of any legislative definition of "public interest" and the possibility of broadly construing the justification clauses enabled the Restrictive Practices Court to determine how severe in its application the 1956 act would be.[15] To date, that court has shown no inclination to condone anticompetitive agreements: out of eight fully adjudicated cases prior to the present case,[16] in only one has a restrictive agreement been found in its main respects consistent with the public interest.[17] In particular, the court has been consistently hostile to price-fixing arrangements.[18]

The court justified the common price scheme in the present case on the ground that it "saved" purchasers expensive shopping around.[19] This protection of buyers from an assumed indulgence in uneconomic price comparisons fails to reflect several factors which encouraged the court to uphold the agreement. The court was noticeably impressed by technical cooperation and intertrading[20] among members of the industry, which

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[14] "The new Act lists seven tests and allows no other considerations in favour of the agreements. This argues, superficially, that the new Act is less lenient to restrictive agreements. . . . [T]he [Monopolies] Commission has on occasion refrained from recommending that an agreement be terminated apparently not because of its positive merits but because of the absence of positive demerits; under the new Act, however, an agreement can be allowed to continue only if the court is satisfied that one or other of the listed advantages is present." Grunfeld & Yamey, *Restrictive Trade Practices Act, 1956*, 1956 PUB. L. 319-20.

[15] *Ibid.* A determination as to public interest is required in every case in which the respondent satisfies one of the justification clauses. The balancing procedure for deciding whether the public interest is being harmed requires a formulation of some sort of economic theory. This is true because the conclusion that a restrictive agreement is detrimental to the public interest is only a prediction that absent the agreement, according to some economic theory, a preferable result would occur. See *id.* at 317-20.

[16] *In re* Phenol Producers' Agreement, L.R. 2 R.P. 1 (1960); *In re* Fed'n of British Carpet Mfrs.' Agreement, L.R. 1 R.P. 472 (1959); *In re* Fed'n of Wholesale & Multiple Bakers' (Great Britain & No. Ireland) Agreement, L.R. 1 R.P. 387 (1959); *In re* Wholesale & Retail Bakers of Scotland Ass'n's Agreement, L.R. 1 R.P. 347 (1959); *In re* Water-Tube Boilermakers' Agreement, L.R. 1 R.P. 285 (1959); *In re* Blanket Mfrs.' Agreement, L.R. 1 R.P. 208 (1959), *appeal dismissed*, L.R. 1 R.P. 271 (C.A. 1959); *In re* Yarn Spinners' Agreement, L.R. 1 R.P. 118 (1959); *In re* Chemists' Fed'n Agreement, L.R. 1 R.P. 75 (1958).

[17] *In re* Water-Tube Boilermakers' Agreement, *supra* note 16, 108 U. PA. L. REV. 924 (1960). See also *In re* Blanket Mfrs.' Agreement, *supra* note 16, where an insignificant part of an agreement was approved.

[18] See *In re* Phenol Producers' Agreement, L.R. 2 R.P. 1 (1960); *In re* Fed'n of British Carpet Mfrs.' Agreement, L.R. 1 R.P. 472 (1959); *In re* Fed'n of Wholesale & Multiple Bakers' (Great Britain & No. Ireland) Agreement, L.R. 1 R.P. 387 (1959); *In re* Wholesale & Retail Bakers of Scotland Ass'n's Agreement, L.R. 1 R.P. 347 (1959); *In re* Yarn Spinners' Agreement, L.R. 1 R.P. 118 (1959); Stevens, *supra* note 1, at 885. *But see In re* Cement Makers' Fed'n Agreement, [1961] 1 Weekly L.R. 581, in which the Restrictive Practices Court, subsequent to the instant case, upheld a price-fixing scheme on the grounds that by giving greater security to investors, who were therefore willing to receive a smaller return (under 10% in the industry as a whole) than they would demand under the insecure circumstances of price competition (15%), the fixed prices were able to be lower than free competition would afford, and that lower prices were a specific and substantial benefit to the public as purchasers.

[19] Instant case at 89-90.

[20] Since no manufacturer produces all sizes and types of fasteners, the members intertrade at a set industry discount in order to fill their customer's orders. "The

foster what the court thought to be desirable specialization and small firm protection.[21] The court realized, however, that it was confined by an act whose language does not exempt an agreement from condemnation because of industrial efficiency, reasonable prices, small firm survival, or economic specialization.[22] Faced with what it considered a reasonable restriction without specific statutory justification, the court seems to have turned to a supposed benefit—the shopping economy [23]— to qualify the agreement as one yielding a "specific and substantial benefit," thereby avoiding the impact of the statutory presumption.[24] In the final balance, to mollify the suggestion that the restriction injures the public by maintaining artificially high prices,[25] the court concluded that prices—thought reasonable in light of the industry's efficiency and level of profits [26]—would not be driven down significantly were the agreement voided.[27]

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general pattern of intertrading is between the larger and the smaller manufacturers, arising from their respective capabilities for producing large quantities of standard sizes in wide demand and lesser quantities of standard sizes for which the demand is relatively small or of 'off standard specials' or 'out and out specials.'" Instant case at 58.

[21] "The inter-trading provisions . . . we think, probably resulted in keeping . . . some of the small manufacturers in business, and . . . [avoided] some plant duplication . . . ." Instant case at 97. "[I]t is probable that the volume of intertrading would diminish if the restrictions were abolished . . . ." *Id.* at 88. Compare *In re* Yarn Spinners' Agreement, L.R. 1 R.P. 118 (1959), where the court disapproved a minimum price agreement, concluding that the industry should be made smaller and that artificial price maintenance merely impeded this process.

[22] The only justification which could possibly encompass these attributes would be the "specific and substantial benefit" clause, but the court conceded that these "benefits" were too speculative to satisfy that clause's requirements. Instant case at 96-97.

[23] The shopping economy is probably imaginary in that it assumes that purchasers will undertake an uneconomic operation. It seems obvious that if it costs more to go shopping than can be realized by savings on lower prices, most purchasers will forego shopping, each relying on one manufacturer who will keep his prices competitive in order not to lose the business. 77 L.Q. REV. 28, 29 (1961). The court recognized this weakness in its argument, but countered that in times of high demand manufacturers—all of whom must rely on intertrading to fill comprehensive orders—would be unwilling to fill intertrade orders until their own established customers were adequately provided. This would force purchasers to shop around in such times because their usual sole suppliers would be unable to fill all their requirements. This argument, however, overlooks the likelihood of purchasers establishing trade relations with enough manufacturers to cover their entire potential needs.

[24] A British commentator has questioned whether the obviation of shopping is a specific and substantial benefit to the public: the association's agreement saves not "'expense' but 'trouble'; and one of the reasons for the Restrictive Trade Practices Act was the tendency of some British industries to save trouble at the cost of efficiency." 77 L.Q. REV. 28, 29 (1961).

[25] The Registrar never argued that prices *in general* were too high. He stressed the spread of profits between different manufacturers—recently as much as 25 percentage points. "It follows that some members must be making larger profits and some losses, and that the current price list really is out of balance in respect of a considerable number of products." Instant case at 72. The court did not deal with this issue, but concentrated on industry profits as a whole. See also instant case at 102.

[26] Instant case at 99, 101-02.

[27] Instant case at 99. *But see* 77 L.Q. REV. 28, 29 (1961): "[T]he principal effect of the termination of the agreement would seem to be to transfer to purchasers administrative costs previously absorbed by the manufacturers—which should be

The court's reasoning that prices would not be appreciably lower without the price-fixing agreement, especially in an industry displaying a wide range of individual firm profits,[28] implicitly rejects the classical economic theory that the lowest possible price will result from firms of differing efficiencies competing in price.[29] Even more significant, however, was the court's use of the transparent shopping economy rationale to fit into a statutory slot an agreement which it found generally unobjectionable.[30] This manifests a disposition on the part of the court to perpetuate the 1948 act's approach of evaluating the reasonableness of each restriction as the court believes it in fact operates.[31] The 1956 act's presumption is thus disregarded even in instances where the new statute would appear to have foreclosed judicial determination. By expanding the "specific and substantial benefit" justification,[32] the court has effectively determined to enjoy the same discretion in evaluating agreements as did the Monopolies Commission.[33] The exercise of such discretion could significantly alter the impact of the 1956 act upon restrictive practices.

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reflected by a reduction in manufacturers' prices." Two other factors also appear to have carried weight with the court: the absence of any witnesses complaining about the level of prices and the testimony of several satisfied customers of the association, who testified that the common price structure was a very advantageous arrangement. Instant case at 94-96.

[28] See note 25 *supra.*

[29] ALLEN, BUCHANAN & COLBERG, PRICES, INCOME, AND PUBLIC POLICY 49-72 (1954).

[30] Compare note 14 *supra.*

[31] An additional manifestation of this empirical approach is the court's treatment of the method used by the association in setting its prices, a method devoid of reliable costing data and which the court described as "open to obvious objections in principle and in detail." Instant case at 85. "But whatever the theoretical objections, the practical result of the methods adopted has been a price list which is rational and reasonable, resulting in a profit level . . . which cannot be regarded as in any way excessive." *Id.* at 101.

[32] It can be argued that the court has not expanded § 21(1)(b). This section uses the language that removal of the restriction "would deny" benefits to the public, whereas paras. (a), (c), and (d) use language to the effect that the restriction must be "reasonably necessary" to certain ends. Whether the difference in wording indicates a Parliamentary intent to have para. (b) offer a wider gateway than the other justification clauses is unclear. If this difference in language was a deliberate attempt to create in (b) a wide gateway, then arguably the court has not "expanded" it. See ALBERY & FLETCHER-COOKE, *op. cit. supra* note 1, at 45 for a discussion of the language differences. See also Grunfeld & Yamey, *supra* note 14, at 319; Cairns, *supra* note 10, at 189-90, for statements noting the particular susceptibility of § 21(1)(b) to expansion.

[33] Although "public interest" is left undefined in the new act, it appears that the Restrictive Practices Court may now be following the formulation provided by Parliament for the Monopolies Commission. Compare the elements discussed in text as actually leading the court to uphold the agreement with the Parliamentary definition of public interest for purposes of the 1948 act set forth in note 9 *supra.*